

more accepted use of electronic filing, service may have been a reasonable requirement to assure timely distribution of relevant materials. However, our electronic filing system generally makes filings available within 24 hours, and the vast majority of parties have access to these materials via the Internet. We, therefore, find that service is not required, and we waive the requirement. Any party that wishes to receive an electronic notification when new documents are filed in the proceeding may subscribe to an RSS feed, available from ECFS.

645. In addition, we waive the specific filing schedule contained in section 65.103(b) of the Commission's rules so that comments may be filed pursuant to the pleading cycle adopted for sections XVII.A-K of the FNPRM. We also find the page limits applicable to rate prescription proceedings to be inappropriate here. Lastly, we waive the requirement in section 65.301 that the Commission publish in this notice the cost of debt, cost of preferred stock, and capital structure computed under our rules, because, as detailed in the FNPRM,¹⁰⁷⁵ the data set necessary to calculate those formulas is no longer collected by the Commission. We seek comment in the FNRPM on those calculations and the related data and methodology issues.

C. Pending Matters

646. We also deny four pending high-cost matters currently pending before the Commission: two petitions for reconsideration of the *Corr Wireless Order*,¹⁰⁷⁶ Puerto Rico Telephone Company, Inc.'s petition to reconsider our decision declining to adopt a new high-cost support mechanism for non-rural insular carriers;¹⁰⁷⁷ and Verizon Wireless's Petition for Reconsideration of the Wireline Competition Bureau's letter directing the USAC to implement certain caps on high-cost universal service support for two companies, known as the "company-specific caps."¹⁰⁷⁸

D. Deletion of Obsolete Universal Service Rules and Conforming Changes to Existing Rules

647. As part of comprehensive reform, we make conforming changes to delete obsolete rules from the Code of Federal Regulations. Specifically, we eliminate our rules governing Long Term Support, which the Commission eliminated as a discrete support program in the *MAG Order*, and Interim Hold Harmless Support for Non-Rural Carriers, which addressed non-rural carriers' transition from high-cost loop support to high-cost model support.¹⁰⁷⁹ Because these rules are obsolete, we find good cause to delete them without notice and comment.¹⁰⁸⁰ We also make conforming changes to existing rules to ensure they are consistent with changes made in this Order.¹⁰⁸¹

X. OVERVIEW OF INTERCARRIER COMPENSATION

648. In this section, we comprehensively reform the intercarrier compensation system to bring substantial benefits to consumers, including reduced rates for all wireless and long distance customers, more innovative communications offerings, and improved quality of service for wireless consumers and consumers of long distance services. The reforms also improve the fairness and efficiency of subsidies

¹⁰⁷⁵ See *infra*. Section XVII.C.

¹⁰⁷⁶ See Appendix F.

¹⁰⁷⁷ See Appendix D.

¹⁰⁷⁸ See Appendix E.

¹⁰⁷⁹ 47 C.F.R. §§ 54.303, 311.

¹⁰⁸⁰ 5 U.S.C. 553(b)(3)(B).

¹⁰⁸¹ See Appendix A.

flowing to high-cost rural areas, and promote innovation by eliminating barriers to the transformation of today's telephone networks into the all-IP broadband networks of the future. The existing intercarrier compensation system—built on geographic and per-minute charges and implicit subsidies—is fundamentally in tension with and a deterrent to deployment of all IP networks. And the system is eroding rapidly as demand for traditional telephone service falls, with consumers increasingly opting for wireless, VoIP, texting, email, and other phone alternatives. Falling demand has led to rising access rates for smaller rural carriers, fueling wasteful arbitrage schemes and prompting costly compensation disputes.

649. To address these issues, we first take immediate action to curtail two of the most prevalent arbitrage activities today, access stimulation and phantom traffic. These schemes involve service providers exploiting loopholes in our rules and ultimately cost consumers hundreds of millions of dollars annually.

650. Next, we launch long-term intercarrier compensation reform by adopting bill-and-keep as the ultimate uniform, national methodology for all telecommunications traffic exchanged with a LEC. We make clear that states will continue to play a vital role within this framework, particularly in the context of negotiated interconnection agreements, arbitrating interconnection disputes under the section 251/252 framework, and defining the network “edge” for bill-and-keep.

651. We begin the transition to bill-and-keep with terminating switched access rates, which are the main source of arbitrage today. We provide for a measured, gradual transition to a bill-and-keep methodology for these rates, and adopt a recovery mechanism that provides carriers with certain and predictable revenue streams. We also begin the process of reforming originating access and other rate elements by capping all interstate rates and most intrastate rates as of the effective date of the rules adopted pursuant to this Order.

652. This Order also makes clear the prospective payment obligations for VoIP traffic and adopts a transitional intercarrier compensation framework for VoIP. In addition, we clarify certain aspects of CMRS-LEC compensation to reduce disputes and address existing ambiguity. We also make clear our expectation that carriers will negotiate in good faith in response to requests for IP-to-IP interconnection for the exchange of voice traffic.

653. Finally, in the Further Notice of Proposed Rulemaking (FNPRM), we seek comment on the transition and recovery mechanism for rate elements not reduced as part of this Order, including originating access and certain common and dedicated transport. We also seek comment on ways to implement our expectation of good faith negotiations for IP-to-IP interconnection for the exchange of voice traffic, ways to promote IP-to-IP interconnection, as well as other implementation issues for the bill-and-keep end state.

654. Our reforms will bring numerous and significant benefits to consumers. As with past intercarrier compensation reforms, we anticipate savings from intercarrier compensation payments will result in more robust wireless service, more innovative offerings, and cost savings to consumers. Our proposed gradual reduction of intercarrier charges and movement to a bill-and-keep methodology will significantly increase the efficiency of long distance and local calling, and of other services more generally. Indeed, we estimate, based on conservative assumptions, that once our ICC reform is complete, mobile and wireline phone consumers stand to gain benefits worth over \$1.5 billion dollars per year.¹⁰⁸²

655. In addition, our reforms will promote the nation's transition to IP networks, creating long-term benefits for consumers, businesses, and the nation. The convergence of data, voice, video, and text in networks based upon IP supports the Internet as an open platform for innovation, investment, job

¹⁰⁸² See *infra* Appendix I.

creation, economic growth, competition, and free expression.

XI. MEASURES TO ADDRESS ARBITRAGE

A. Rules To Reduce Access Stimulation

656. In this section, we adopt revisions to our interstate switched access charge rules to address access stimulation. Access stimulation occurs when a LEC with high switched access rates enters into an arrangement with a provider of high call volume operations such as chat lines, adult entertainment calls, and “free” conference calls. The arrangement inflates or stimulates the access minutes terminated to the LEC, and the LEC then shares a portion of the increased access revenues resulting from the increased demand with the “free” service provider, or offers some other benefit to the “free” service provider. The shared revenues received by the service provider cover its costs, and it therefore may not need to, and typically does not, assess a separate charge for the service it is offering. Meanwhile, the wireless and interexchange carriers (collectively IXCs) paying the increased access charges are forced to recover these costs from all their customers, even though many of those customers do not use the services stimulating the access demand.

657. Access stimulation schemes work because when LECs enter traffic-inflating revenue-sharing agreements, they are currently not required to reduce their access rates to reflect their increased volume of minutes. The combination of significant increases in switched access traffic with unchanged access rates results in a jump in revenues and thus inflated profits that almost uniformly make the LEC’s interstate switched access rates unjust and unreasonable under section 201(b) of the Act.¹⁰⁸³ Consistent with the approach proposed in the *USF/ICC Transformation NPRM*, we adopt a definition of access stimulation that includes two conditions. If a LEC meets those conditions, the LEC generally must reduce its interstate switched access tariffed rates to the rates of the price cap LEC in the state with the lowest rates, which are presumptively consistent with the Act.¹⁰⁸⁴ This will reduce the extent to which IXC customers that do not use the stimulating services are forced to subsidize the customers that do use the services.

658. Based on the record received in response to the single-pronged trigger proposed in the *USF/ICC Transformation NPRM*, we modify our approach from defining an access stimulation trigger to defining access stimulation. The access stimulation definition we adopt now has two conditions: (1) a revenue sharing condition, revised slightly from the proposal in the *USF/ICC Transformation NPRM*; and (2) an additional traffic volume condition, which is met where the LEC either: (a) has a three-to-one interstate terminating-to-originating traffic ratio in a calendar month; or (b) has had more than a 100 percent growth in interstate originating and/or terminating switched access MOU in a month compared to the same month in the preceding year. If both conditions are satisfied, the LEC generally must file revised tariffs to account for its increased traffic.

659. Adoption of the definition of access stimulation with two conditions will facilitate enforcement of the new access stimulation rules in instances where a LEC meets the conditions for access stimulation but does not file revised tariffs. In particular, IXCs will be permitted to file complaints based on evidence from their traffic records that a LEC has exceeded either of the traffic measurements of the second condition, i.e., that the second condition has been met. If the IXC filing the complaint makes this

¹⁰⁸³ 47 U.S.C. § 201(b), which provides that “[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful” See *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, Notice of Proposed Rulemaking, 22 FCC Rcd 17989, 17995-96, para. 14 (*Access Stimulation NPRM*).

¹⁰⁸⁴ See *infra* Appendix A, Section 61.26(g).

showing, the burden will shift to the LEC to establish that it has not met the access stimulation definition and therefore that it is not in violation of our rules. This burden-shifting approach will enable IXCs to bring complaints based on their own traffic data, and will help the Commission to identify circumstances where a LEC may be in violation of our rules.

660. We conclude that these revised interstate access rules are narrowly tailored to minimize the costs of the rule revisions on the industry, while reducing the adverse effects of access stimulation and ensuring that interstate access rates are at levels presumptively consistent with section 201(b) of the Act.

1. Background

661. In the *USF/ICC Transformation NPRM*, we proposed that carriers that have entered a revenue sharing arrangement be required to refile their interstate switched access tariffs to reflect a rate more consistent with their volume of traffic. For rate-of-return LECs, the rate would be adjusted to account for new demand and any increase in costs. For competitive LECs, that rate would be benchmarked to that of the BOC in the state, or, if there was no BOC in the state, to the largest incumbent LEC in the state. We also sought comment on alternative approaches.¹⁰⁸⁵

2. Discussion

a. Need for Reform to Address Access Stimulation

662. The record confirms the need for prompt Commission action to address the adverse effects of access stimulation and to help ensure that interstate switched access rates remain just and reasonable, as required by section 201(b) of the Act. Commenters agree that the interstate switched access rates being charged by access stimulating LECs do not reflect the volume of traffic associated with access stimulation.¹⁰⁸⁶ As a result, access stimulating LECs realize significant revenue increases and thus inflated profits that almost uniformly make their interstate switched access rates unjust and unreasonable.

663. Access stimulation imposes undue costs on consumers, inefficiently diverting capital away from more productive uses such as broadband deployment.¹⁰⁸⁷ When access stimulation occurs in locations that have higher than average access charges, which is the predominant case today, the average per-minute cost of access and thus the average cost of long-distance calling is increased.¹⁰⁸⁸ Because of the rate integration requirements of section 254(g) of the Act, long-distance carriers are prohibited from passing on the higher access costs directly to the customers making the calls to access stimulating entities.¹⁰⁸⁹ Therefore, all customers of these long-distance providers bear these costs, even though many of them do not use the access stimulator's services, and, in essence, ultimately support businesses designed to take advantage of today's above-cost intercarrier compensation rates.¹⁰⁹⁰

¹⁰⁸⁵ See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4757-70, paras. 635-670.

¹⁰⁸⁶ See, e.g., Free Conferencing Corporation Section XV Comments at 26; ZipDX Section XV Comments at 5.

¹⁰⁸⁷ See 47 U.S.C. § 1302.

¹⁰⁸⁸ See, e.g., AT&T Section XV Comments at 7-8, 11-12.

¹⁰⁸⁹ 47 U.S.C. § 254(g). IXCs charge averaged rates for long-distance calls pursuant to the rate integration policy. To the extent that its average access costs are increased, the costs are spread among all customers of the IXC.

¹⁰⁹⁰ See, e.g., AT&T Section XV Comments at 7. Some parties argue that IXCs are profitable overall or they would eliminate their "all you can eat" pricing plans. See, e.g., Bluegrass Section XV Comments at 8-9; Free Conferencing Corporation Section XV Comments at 24-25. Whether the IXC's revenues for a call are more or less than its cost of terminating the call is not at issue. The question is whether just and reasonable rates are being charged for the provision of interstate switched access services. See 47 U.S.C. § 201(b).

664. The record indicates that a significant amount of access traffic is going to LECs engaging in access stimulation. TEOCO estimates that the total cost of access stimulation to IXC has been more than \$2.3 billion over the past five years.¹⁰⁹¹ Verizon estimates the overall costs to IXCs to be between \$330 and \$440 million per year, and states that it expected to be billed between \$66 and \$88 million by access stimulators for approximately two billion wireline and wireless long-distance minutes in 2010.¹⁰⁹² Other parties indicate that payment of access charges to access stimulating LECs is the subject of large numbers of disputes in a variety of forums.¹⁰⁹³ When carriers pay more access charges as a result of access stimulation schemes, the amount of capital available to invest in broadband deployment and other network investments that would benefit consumers is substantially reduced.¹⁰⁹⁴

665. Access stimulation also harms competition by giving companies that offer a “free” calling service a competitive advantage over companies that charge their customers for the service. For example, conference calling provider ZipDX indicates that, by not engaging in access stimulation, it is at a disadvantage vis-à-vis competitors that engage in access stimulation.¹⁰⁹⁵ Providers of conferencing services, like ZipDX, are recovering the costs of the service, such as conference bridges, marketing, and billing, from the user of the service rather than, as explained above in the case of access stimulators, spreading those costs across the universe of long-distance subscribers.¹⁰⁹⁶ As a result, the services offered by “free” conferencing providers that leverage arbitrage opportunities put companies that recover the cost of services from their customers at a distinct competitive disadvantage.

666. Several parties claim that access stimulation offers economic development benefits, including the expansion of broadband services to rural communities and tribal lands.¹⁰⁹⁷ Although expanding broadband services in rural and Tribal lands is important, we agree with other commenters that how access revenues are used is not relevant in determining whether switched access rates are just and reasonable in accordance with section 201(b).¹⁰⁹⁸ In addition, excess revenues that are shared in access

¹⁰⁹¹ See TEOCO, ACCESS STIMULATION BLEEDS CSPs OF BILLIONS, at 5 (TEOCO Study), *attached to* Letter from Glenn Reynolds, Vice President – Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135 (filed Oct. 18, 2010).

¹⁰⁹² See Letter from Donna Epps, Vice President-Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135, at 1 (filed Oct. 12, 2010).

¹⁰⁹³ See, e.g., Bluegrass Section XV Comments at 28-29.

¹⁰⁹⁴ See, e.g., AT&T Section XV Comments at 3; USTelecom Section XV Comments at 6-8.

¹⁰⁹⁵ Letter from David Frankel, CEO, ZipDX, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135, at 1, 3 (filed Nov. 26, 2010).

¹⁰⁹⁶ See Testimony of David Frankel, Founder, ZipDX, at the April 6, 2011, WCB Workshop at 25 (“[Zip DX] pay[s] interstate compensation charges as part of [our] wholesale arrangements with our underlying service providers”), *available at* <http://webapp01.fcc.gov/ecfs/document/view?id=7021340998>.

¹⁰⁹⁷ See, e.g., Free Conferencing Corporation Section XV Comments at 6-7 (the revenues that LECs generate from traffic on their networks allow those carriers to invest in building out their networks with no federal financial support); Global Section XV Comments at 8 (revenues from competitive conferencing services help further investment in rural infrastructure, thereby promoting development).

¹⁰⁹⁸ See, e.g., NASUCA and NJ Rate Counsel Section XV Comments at 11-12; Sprint Section XV Reply at 1-2; Statement of Iowa Utilities Board Member Krista Tanner at the April 6, 2011 Workshop, at 61 (“[I]t doesn’t matter what the traffic is for. It doesn’t matter what you do with your reasonable profits.”). The Commission is considering a wide range of issues related to improving communications services for Native Nations. See generally *Improving Communications Services for Native Nations*, CG Docket No. 11-41, Notice of Inquiry, 26 FCC Rcd 2672 (2011).

stimulation schemes provide additional proof that the LEC's rates are above cost. Moreover, Congress created an explicit universal service fund to spur investment and deployment in rural, high cost, and insular areas, and the Commission is taking action here and in other proceedings to facilitate such deployment.¹⁰⁹⁹

(i) Access Stimulation Definition

667. We adopt a definition to identify when an access stimulating LEC must refile its interstate access tariffs at rates that are presumptively consistent with the Act. After reviewing the record, we make a few changes to the *USF/ICC Transformation NPRM* proposal, including defining access stimulation as occurring when two conditions are met. The first condition is that the LEC has entered into an access revenue sharing agreement, and we clarify what types of agreements qualify as "revenue sharing." The second condition is met where the LEC either has had a three-to-one interstate terminating-to-originating traffic ratio in a calendar month, or has had a greater than 100 percent increase in interstate originating and/or terminating switched access MOU in a month compared to the same month in the preceding year. We adopt these changes to ensure that the access stimulation definition is not over-inclusive and to improve its enforceability.

668. *Definition of a Revenue Sharing Agreement.* Many parties agree that the use of the revenue sharing arrangement trigger alone as proposed in the *USF/ICC Transformation NPRM* would be reasonable to reduce access stimulation,¹¹⁰⁰ and other parties argue the existence of a revenue sharing arrangement should be used in conjunction with another condition.¹¹⁰¹ However, the use of a revenue sharing approach alone was criticized by some as being ambiguous, circular, or a poor indicator of access stimulation.¹¹⁰² Other parties found the definition of revenue sharing to be over-inclusive and/or under-inclusive.¹¹⁰³ Several commenters offered suggestions on how to revise the definitional language.¹¹⁰⁴

¹⁰⁹⁹ See *supra* Sections VI and VII; see also, e.g., *Implementation of Section 224 of the Act; A National Broadband Plan For Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 at 5319, para. 178 (2011) (*2011 Pole Attachment Order*).

¹¹⁰⁰ See, e.g., CenturyLink Section XV Comments at 39-40; Global Section XV Comments at 12 ("appropriately tailored step that strikes a proper balance between the Commission's policy concerns and the legitimate business practices of carriers"); Omnitel and Tekstar Section XV Comments at 12-13. *But see* Beehive Section XV Comments at 5-7; EarthLink Section XV Comments at 13-16; HyperCube Section XV Comments at 4; Free Conferencing Corporation Section XV Comments at 2-3, 12-13.

¹¹⁰¹ See, e.g., AT&T Section XV Comments at 18-20; Leap Wireless and Cricket Section XV Comments at 6-7.

¹¹⁰² See, e.g., ZipDX Section XV Comments at 5; EarthLink Section XV Comments at 13-14; RNK Section XV Comments at 10-11 (will generate more disputes); Letter from Edward A. Yorkgitis, Jr., Counsel to Omnitel Communications, Inc and Tekstar Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135, at 2 (filed May 9, 2011) (Omnitel and Tekstar May 9, 2011 *Ex Parte* Letter).

¹¹⁰³ See, e.g., Rural Associations Section XV Comments at 32-36; PAETEC et al. Section XV Comments at 21.

¹¹⁰⁴ See, e.g., ZipDX Section XV Comments at 5 (proposing a revised definition to read: "Access revenue sharing occurs when a rate-of-return ILEC or CLEC enters in an agreement with another party (including an affiliate) that results in the aggregate fees owed to the ILEC or CLEC by the other party decreasing as the volume of access-fee-generating traffic attributable to that other party increases (including to the point that the other party is receiving a net payment from the ILEC or CLEC."); HyperCube Section XV Comments at 10 (proposing to distinguish wholesale sharing agreements from retail agreements and exclude wholesale agreements from the definition of revenue sharing); Omnitel and Tekstar May 9, 2011 *Ex Parte* Letter, Attach. at 1 (proposing a revised definition to read: "Access revenue sharing occurs when a rate-of-return ILEC or a CLEC enters into an agreement that will result in a net payment over the course of the agreement to the other party (including affiliates) to the agreement, in which payment by the rate-of-return ILEC or CLEC is tied to the billing or collection of access charges from (continued...)")

669. After reviewing the record, we clarify the scope of the access revenue sharing agreement condition of the new access stimulation definition. The access revenue sharing condition of the access stimulation definition we adopt herein is met when a rate-of-return LEC or a competitive LEC: “has an access revenue sharing agreement, whether express, implied, written or oral, that, over the course of the agreement, would directly or indirectly result in a net payment to the other party (including affiliates) to the agreement, in which payment by the rate-of-return LEC or competitive LEC is based on the billing or collection of access charges from interexchange carriers or wireless carriers. When determining whether there is a net payment under this rule, all payments, discounts, credits, services, features, functions, and other items of value, regardless of form, provided by the rate-of-return LEC or competitive LEC to the other party to the agreement shall be taken into account.”¹¹⁰⁵

670. This rule focuses on revenue sharing that would result in a net payment to the other entity over the course of the agreement¹¹⁰⁶ arising from the sharing of access revenues.¹¹⁰⁷ We intend the net payment language to limit the revenue sharing definition in a manner that, along with the traffic measurements discussed below, best identifies the revenue sharing agreements likely to be associated with access stimulation and thus those cases in which a LEC must refile its switched access rates. Revenue sharing may include payments characterized as marketing fees or other similar payments that result in a net payment to the access stimulator. However, this rule does not encompass typical, widely available, retail discounts offered by LECs through, for example, bundled service offerings.

671. Some commenters assert that the proposed definition of access revenue sharing arrangements was over-inclusive and/or under-inclusive.¹¹⁰⁸ We believe that the net payment language, combined with either the terminating-to-originating traffic ratio or the traffic growth requirement, sufficiently limits the scope of the revenue sharing definition by narrowing the number of carriers that could be subject to the trigger. HyperCube argues that the Commission should exclude wholesale services from the definition of revenue sharing agreements.¹¹⁰⁹ We find HyperCube’s proposal unpersuasive because the sharing of access revenues is involved and thus should be covered if the second

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interexchange carriers. When determining whether there is a net payment under this rule, all payment, discounts, credits, services, features and functions, and other items of value, regardless of form, given by the rate-of-return ILEC or CLEC to the other party in connection with the shall be taken into account.”).

¹¹⁰⁵ See *infra* Appendix A.

¹¹⁰⁶ The use of “over the course of the agreement” does not preclude an IXC from filing a complaint if the traffic measurement condition is met. The agreement is to be interpreted in terms of what the anticipated net payments would be over the course of the agreement.

¹¹⁰⁷ We clarify that patronage dividends paid by cooperatives generally do not constitute revenue sharing as contemplated by this definition. See Rural Associations Section XV Comments at 33-34. However, a cooperative, like other LECs, could structure payments in a manner to engage in revenue sharing that would cause it to meet the definition as discussed herein.

¹¹⁰⁸ See, e.g., PAETEC et al. Section XV Comments at 21 (claiming that the net payor test is both over- and under-inclusive because it targets the wrong factor—unreasonable traffic spikes in high-access-cost areas is more a function of the portability of the traffic than the direction or amount of net payments); Rural Associations Section XV Comments at 32-36 (claiming that the Commission must distinguish between situations where traffic levels are artificially inflated and situations where traffic increases as a result of legitimate economic activity); HyperCube Section XV Comments at 4 (claiming that the revenue sharing definition is over-inclusive because it would encompass wholesale revenue sharing arrangements that HyperCube believes are in the public interest by promoting a competitive environment, rather than focusing on end-user stimulation).

¹¹⁰⁹ HyperCube Section XV Comments at i, 4.

condition of the definition is met.¹¹¹⁰ If a LEC's circumstances change because it terminates the access revenue sharing agreement(s), it may file a tariff to revise its rates under the rules applicable when access stimulation is not occurring.¹¹¹¹ As part of that tariff filing, an officer of the LEC must certify that it has terminated the revenue sharing agreement(s).

672. Several parties have urged us to declare revenue sharing to be a violation of section 201(b) of the Act.¹¹¹² Other parties argue that the Commission should prohibit the collection of switched access charges for traffic sent to access stimulators.¹¹¹³ Many commenters, on the other hand, assert that revenue sharing is a common business practice that has been endorsed in some situations by the Commission.¹¹¹⁴ As proposed in the *USF/ICC Transformation NPRM*, we do not declare revenue sharing to be a *per se* violation of section 201(b) of the Act.¹¹¹⁵ A ban on all revenue sharing arrangements could be overly broad,¹¹¹⁶ and no party has suggested a way to overcome this shortcoming. Nor do we find that parties have demonstrated that traffic directed to access stimulators should not be subject to tariffed access charges in all cases. We note that the access stimulation rules we adopt today are part of our comprehensive intercarrier compensation reform. That reform will, as the transition unfolds, address remaining incentives to engage in access stimulation.

673. A few parties argue that the Commission explicitly approved revenue sharing in the *CLEC Access Charge Reconsideration Order* when it found that commission payments from competitive LECs to generators of toll-free traffic, such as hotels and universities, did not create any incentives for the individuals who use those facilities to place excessive or fraudulent calls.¹¹¹⁷ That case is inapposite. The Commission there was responding to IXC assertions in connection with 8YY calling and the Commission noted that it did not appear that the payments would affect calling patterns because the commissions did not create any incentive for those actually placing the calls to artificially inflate their 8YY traffic.¹¹¹⁸ By contrast, when access traffic is being stimulated, the party receiving the shared revenues has an economic incentive to increase call volumes by advertising the stimulating services widely.

¹¹¹⁰ In all events, HyperCube states that it is already benchmarking to the rates of the BOC in its service areas and thus would likely be unaffected by the rules adopted here, even though we are departing from the BOC rates as the benchmark and using the lowest price cap rate in the state. *Id.* at 3.

¹¹¹¹ See Bluegrass Section XV Comments at 19.

¹¹¹² See, e.g., CenturyLink Section XV Comments at 33-34, 53 (sharing of revenues is unreasonable practice under section 201(b)); XO Section XV Comments at 44; USTelecom Section XV Comments at 10; AT&T Section XV Comments at 12-13.

¹¹¹³ See, e.g., AT&T Section XV Comments at 12-15; Sprint Section XV Comments at 20; CenturyLink Section XV Comments at 34-35 (Billing IXC for tariffed access charges for traffic delivered to business partner instead of end user violates most LECs' access tariffs and FCC rules.).

¹¹¹⁴ See, e.g., HyperCube Section XV Comments at 7-8 (Commission should not ban revenue sharing agreements that are invisible to the calling party, such as HyperCube, and therefore do not stimulate the calling party to place additional calls.).

¹¹¹⁵ See, e.g., Cablevision and Charter Section XV Comments at 13-14; Free Conferencing Corporation Section XV Comments at 30; Neutral Tandem Section XV Comments at 5.

¹¹¹⁶ See, e.g., *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9142-43, para. 70 (2004) (*CLEC Access Charge Reform Reconsideration Order*); *AT&T's Private Payphone Commission Plan*, ENF-87-19, Memorandum Opinion and Order, 7 FCC Rcd 7135 (1992).

¹¹¹⁷ PAETEC et al. Section XV Comments at 27; EarthLink Section XV Comments at 19-20.

¹¹¹⁸ See *CLEC Access Charge Reform Reconsideration Order*, 19 FCC Rcd at 9142-43, para. 70.

674. Several parties ask that we address the potential for LECs to attempt to evade the prohibition on access stimulation by integrating high call volume operations within the same corporate entity as the LEC, rather than providing those services through contracts with third parties or affiliates, so that it is able to characterize this arrangement as something other than a revenue sharing agreement.¹¹¹⁹ In particular, CenturyLink argues that revenue sharing in the access stimulation context, however structured, violates section 254(k) of the Act because terminating switched access is a monopoly service and the conferencing services are competitive.¹¹²⁰ The rules adopted here pursuant to sections 201 and 202 of the Act address conferencing services being provided by a third party, whether affiliated with the LEC or not.¹¹²¹ Section 254(k) would apply to a LEC's operation of an access stimulation plan within its own corporate organization. In that context, as we have found in other proceedings, terminating access is a monopoly service.¹¹²² The conferencing activity, as portrayed by the parties engaged in access stimulation, would be a competitive service.¹¹²³ Thus, the use of non-competitive terminating access revenues to support competitive conferencing service within the LEC operating entity would violate section 254(k) and appropriate sanctions could be imposed.

675. *Addition of a Traffic Measurement Condition.* After reviewing the record, we agree that it is appropriate to include a traffic measurement condition in the definition of access stimulation.¹¹²⁴ Accordingly, in addition to requiring the existence of a revenue sharing agreement, we add a second condition to the definition requiring that a LEC: "has either an interstate terminating-to-originating traffic ratio of at least 3:1 in a calendar month, or has had more than a 100 percent growth in interstate originating and/or terminating switched access MOU in a month compared to the same month in the preceding year."¹¹²⁵ The addition of a traffic measurement component to the access stimulation definition creates a bright-line rule that responds to record concerns about using access revenue sharing alone. We conclude that these measurements of switched access traffic of all carriers exchanging traffic with the LEC reflect the significant growth in traffic volumes that would generally be observed in cases where access stimulation is occurring and thus should make detection and enforcement easier. Carriers paying switched access charges can observe their own traffic patterns for each of these traffic measurements and file complaints based on their own traffic patterns. Thus, this will not place a burden on LECs to file traffic reports, as some proposals would.¹¹²⁶

¹¹¹⁹ See, e.g., Level 3 Section XV Comments at 5; Verizon Section XV Comments at 43-44.

¹¹²⁰ CenturyLink Section XV Comments at 43-50. In relevant part, section 254(k) provides that "[a] telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition." 47 U.S.C. § 254(k).

¹¹²¹ Free Conferencing Corporation, on the other hand, argues that using revenue sharing as a trigger discriminates in favor of vertically integrated companies, such as AT&T and Verizon, where the conference calling provider and the LEC collecting access charges are part of the same overall enterprise. Free Conferencing Corporation Section XV Comments at 26-27; see also Global Section XV Comments at 11-12. This argument is unpersuasive for the reasons stated in paragraph 666 *supra*.

¹¹²² See *CLEC Access Charge Order*, 16 FCC Rcd 9923, 9935, para. 30.

¹¹²³ See, e.g., Free Conferencing Corporation Section XV Comments at 1, 17; Global Section XV Comments at 9.

¹¹²⁴ See, e.g., AT&T Section XV Comments at 18-20; ITTA Section XV Comments at 25; Verizon Section XV Comments at 44.

¹¹²⁵ See *infra* Appendix A.

¹¹²⁶ See Letter from Henry Goldberg, Counsel for Free Conferencing Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, GN Docket No. 09-51, CC Docket No. 01-92, Attach. at 7 (filed July 8, 2011) (Free Conferencing Corporation July 8, 2011 *Ex Parte* Letter).

676. The record offers support for both a terminating-to-originating traffic ratio¹¹²⁷ and a traffic growth factor.¹¹²⁸ The Commission adopted a 3:1 ratio in its 2001 *ISP-Remand Order* to address a similar arbitrage scheme based on artificially increasing reciprocal compensation minutes.¹¹²⁹ Further, the Wireline Competition Bureau employed a 100 percent traffic growth factor as a benchmark in a tariff investigation to address the potential that some rate-of-return LECs might engage in access stimulation after having filed tariffs with high switched access rates.¹¹³⁰ In each case, the approach was largely successful in identifying and reducing the practice.

677. We conclude that the use of a terminating-to-originating traffic ratio in conjunction with a traffic growth factor as alternative traffic measures addresses the shortcomings of using either component separately. A few parties argue that carriers can game the terminating-to-originating traffic ratio component by simply increasing the number of originating MOU.¹¹³¹ The traffic growth component protects against this possibility because increasing the originating access traffic to avoid tripping the 3:1 component would likely mean total access traffic would increase enough to trip the growth component. The terminating-to-originating traffic ratio component will capture those current access stimulation situations that already have very high volumes that could otherwise continue to operate without tripping the growth component. For example, a LEC that has been engaged in access stimulation for a significant period of time would have a high terminating traffic volume that, under a traffic growth factor alone, could continue to expand its operations, possibly avoiding the condition entirely by controlling its terminating traffic. Because these alternative traffic measurements are combined with the requirement that an access revenue sharing agreement exist, we reduce the risk that the terminating-to-originating traffic ratio or traffic growth components of the definition could be met by legitimate changes in a LEC's calling patterns. The combination of these two traffic measurements as alternatives is preferable to either standing alone, as some parties have urged.¹¹³² A terminating-to-originating traffic ratio or traffic growth condition alone could prove to be overly inclusive by encompassing LECs that had realized access traffic

¹¹²⁷ See, e.g., CTIA Section XV Comments at 7-9; Sprint Section XV Comments at 8-9, 18-20; Ohio Commission Section XV Comments at 15; Time Warner Cable Section XV Comments at 15-16; Leap Wireless and Cricket Section XV Comments at 6-7.

¹¹²⁸ See, e.g., XO Section XV Comments at 41-43; RNK Section XV Comments at 11-12; Cox Section XV Comments at 13; NASUCA and NJ Rate Counsel Section XV Comments at 10.

¹¹²⁹ See *Inter-carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9183, para. 70 (2001) (subsequent history omitted) (*ISP Remand Order*). There, as here, reciprocal compensation rates were sufficiently high that many competitive LECs found it profitable to target and serve ISP customers who were large recipients of local traffic, since dial-up Internet customers would place calls to their ISP with lengthy hold times. This practice led to significant traffic imbalances, with competitive LECs seeking substantial amounts in reciprocal compensation payments from other LECs.

¹¹³⁰ See *Investigation of Certain 2007 Annual Access Tariffs*, WC Docket No. 07-184, WCB/Pricing No. 07-10, Order Designating Issues for Investigation, 22 FCC Rcd 11619 at 16120, para. 28 (WCB 2007) (*Designation Order*). The *Designation Order* identified two safe harbor provisions that would allow the affected carriers to avoid the investigation if the carrier either: (1) elected to return to the NECA pool; or (2) added language to its tariff that would commit to the filing of a revised tariff if the filing carrier experienced a 100 percent increase in monthly demand when compared to the same month in the prior year. *Id.*

¹¹³¹ See, e.g., Letter from Henry Goldberg, Counsel for Free Conferencing Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, GN Docket No. 09-51, CC Docket No. 01-92, Attach. at 8 (filed May 26, 2011); Letter from Norina Moy, Director, Government Affairs, Sprint, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135, at 4-7 (filed June 15, 2011).

¹¹³² See, e.g., XO Section XV Comments at 46; RNK Section XV Comments at 12 (50 percent increase over the previous six months would create a rebuttable presumption of being engaged in access stimulation).

growth through general economic development, unaided by revenue sharing. Such situations could include the location of a customer support center in a new community without any revenue sharing arrangement, or a new competitive LEC that is experiencing substantial growth from a small base.¹¹³³

678. We decline to adopt a condition based on absolute MOU per line, either on a stand-alone basis or in conjunction with a revenue sharing condition, as suggested by several parties.¹¹³⁴ Under these proposals, if a LEC's MOUs per line exceeded a specified threshold, the LEC would be required to take some action to reduce its rates. Many LECs could evade a MOU per line condition simply by adding additional lines. Moreover, a MOU per line approach would require self-reporting, because neither an IXC nor the Commission could otherwise readily tell if the condition had been met.

(ii) Remedies

679. If a LEC meets both conditions of the definition, it must file a revised tariff except under certain limited circumstances. As explained in more detail below, a rate-of-return LEC must file its own cost-based tariff under section 61.38 of the Commission's rules and may not file based on historical costs under section 61.39 of the Commission's rules or participate in the NECA traffic-sensitive tariff. If a competitive LEC meets the definition, it must benchmark its tariffed access rates to the rates of the price cap LEC with the lowest interstate switched access rates in the state, rather than to the rates of the BOC or the largest incumbent LEC in the state (as proposed in the *USF/ICC Transformation NPRM*). We conclude, however, that if a LEC has terminated its revenue sharing agreement(s) before the deadline we establish for filing its revised tariff, or if the competitive LEC's rates are already below the benchmark rate, such a LEC does not have to file a revised interstate switched access tariff. However, once a rate-of-return LEC or a competitive LEC has met both conditions of the definition and has filed revised tariffs, when required, it may not file new tariffs at rates other than those required by the revised pricing rules until it terminates its revenue sharing agreement(s), even if the LEC no longer meets the 3:1 terminating-to-originating traffic ratio condition of the definition or traffic growth threshold. As price cap LECs reduce their switched access rates under the ICC reforms we adopt herein, competitive LECs must benchmark to the reduced rates.

680. *Rate-of-Return Carriers Filing Tariffs Based on Historical Costs and Demand: Section 61.39.* We adopt our proposal in the *USF/ICC Transformation NPRM* that a LEC filing access tariffs pursuant to section 61.39 would lose its ability to base its rates on historical costs and demand if it is engaged in access stimulation.¹¹³⁵ Incumbent LECs filing access tariffs pursuant to section 61.39 of the Commission's rules currently base their rates on historical costs and demand, which, because of their small size, generally results in high switched access rates based on the high costs and low demand of such carriers.¹¹³⁶ The limited comment in the record was supportive of our proposal for the reasons set forth in

¹¹³³ State Joint Board Members propose a condition for access stimulation based on a terminating ratio one standard deviation above the national average terminating ratio annually. See State Members Comments at 156. Under their proposal, a carrier meeting this condition would set new rates so that the terminating revenue for any carrier equals the carrier's initial rate times its originating minutes times the terminating ratio at the one standard deviation point. *Id.* We decline to adopt this proposal because it is unclear that using originating traffic volumes would produce a rate that adequately reflects the increased terminating traffic volumes sufficient to ensure that rates are just and reasonable as required by Section 201(b) of the Act.

¹¹³⁴ See, e.g., USTelecom Section XV Comments at 9 n.20; Rural Associations Section XV Comments at 33-36; ITTA Section XV Comments at 25; Louisiana Small Company Committee Section XV Comments at 16-17; Toledo Telephone Section XV Comments at 7.

¹¹³⁵ *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4767, para. 664.

¹¹³⁶ 47 C.F.R. § 61.39.

the *USF/ICC Transformation NPRM*.¹¹³⁷ We accordingly revise section 61.39 to bar a carrier otherwise eligible to file tariffs pursuant to section 61.39 from doing so if it meets the access stimulation definition. We also require such a carrier to file a revised interstate switched access tariff pursuant to section 61.38 within 45 days after meeting the definition, or within 45 days after the effective date of this rule in cases where the carrier meets the definition on that date.

681. *Participation in NECA Tariffs.* In the *USF/ICC Transformation NPRM*, the Commission proposed that a carrier engaging in revenue sharing would lose its eligibility to participate in the NECA tariffs 45 days after engaging in access stimulation, or 45 days after the effective date of this rule in cases where it currently engages in access stimulation.¹¹³⁸ A carrier leaving the NECA tariff thus would have to file its own tariff for interstate switched access, pursuant to section 61.38 of the rules.¹¹³⁹

682. The record is generally supportive of this approach for the reasons stated in the *USF/ICC Transformation NPRM*,¹¹⁴⁰ and we adopt it, subject to one modification. We clarify that, pursuant to section 69.3(e)(3) of the rules,¹¹⁴¹ a LEC required to leave the NECA interstate tariff (which includes both switched and special access services) because it has met the access stimulation definition must file its own tariff for both interstate switched and special access services.¹¹⁴²

683. We also adopt a revision to the proposed rule similar to a suggestion by the Louisiana Small Carrier Committee, which recommends that rate-of-return carriers be given an opportunity to show that they are in compliance with the Commission's rules before being required to file a revised tariff.¹¹⁴³ Accordingly, we conclude that if a carrier sharing access revenues terminates its access revenue sharing agreement before the date on which its revised tariff must be filed, it does not have to file a revised tariff. We believe that when sharing agreements are terminated, in most instances traffic patterns should return to levels that existed prior to the LEC entering into the access revenue sharing agreement. This eliminates a burden on such carriers when there is no ongoing reason for requiring such a filing.

684. *Rate of Return Carriers Filing Tariffs Based On Projected Costs and Demand: Section 61.38.* In the *USF/ICC Transformation NPRM*, we proposed that a carrier filing interstate switched access tariffs based on projected costs and demand pursuant to section 61.38 of the rules be required to file revised access tariffs within 45 days of commencing access revenue sharing, or within 45 days of the

¹¹³⁷ See, e.g., AT&T Section XV Comments at 17-18; Level 3 Section XV Comments at 3; USTelecom Section XV Comments at 11.

¹¹³⁸ *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4766, para. 662.

¹¹³⁹ *Id.*

¹¹⁴⁰ See, e.g., Rural Associations Section XV Comments at 35-36; AT&T Section XV Comments at 17-18; Level 3 Section XV Comments at 3; but see USTelecom Section XV Comments at 10-11 (arguing that such a rule is unnecessary).

¹¹⁴¹ 47 C.F.R. § 69.3(e)(3).

¹¹⁴² USTelecom suggests that given that shared revenues are not appropriately included in a carrier's revenue requirement, the Commission does not need to address eligibility for participation in NECA tariffs in its access stimulation rules—a carrier would either stop sharing, or file its own tariff without any mandate to do so. USTelecom Section XV Comments at 10-11. We disagree, because current rules only provide for a participating carrier to leave the NECA tariff at the time of the annual tariff filing. A rule prohibiting LECs from further participating in the NECA tariff when the definition is met, and providing for advance notice to NECA, spells out the procedure.

¹¹⁴³ Louisiana Small Company Committee Section XV Comments at 17 (for example, because unexpectedly high levels of traffic have been terminated).

effective date of the rule if the LEC on that date is engaged in access revenue sharing,¹¹⁴⁴ unless the costs and demand arising from the new revenue sharing arrangement had been reflected in its most recent tariff filing.¹¹⁴⁵ We further proposed that payments made by a LEC pursuant to an access revenue sharing arrangement should not be included as costs in the rate-of-return LEC's interstate switched access revenue requirement because such payments have nothing to do with the provision of interstate switched access service and are thus not used and useful in the provision of such service.¹¹⁴⁶ Thus, we proposed to clarify prospectively that a rate-of-return carrier that shares access revenue, provides other compensation to an access stimulating entity, or directly provides the stimulating activity, and bundles those costs with access, is engaging in an unreasonable practice that violates section 201(b) and the prudent expenditure standard.¹¹⁴⁷

685. We adopt the approach proposed in the *USF/ICC Transformation NPRM*. Commenters that addressed this issue support the approach.¹¹⁴⁸ In particular, we adopt a rule requiring carriers filing interstate switched access tariffs based on projected costs and demand pursuant to section 61.38 of the rules to file revised access tariffs within 45 days of commencing access revenue sharing, or within 45 days of the effective date of the rule if the LEC on that date was engaged in access revenue sharing,¹¹⁴⁹ unless the costs and demand arising from the new access revenue sharing agreement were reflected in its most recent tariff filing. This tariff filing requirement provides the carrier with the opportunity to show, and the Commission to review, any projected increase in costs, as well as to consider the higher anticipated demand in setting revised rates. If the access revenue sharing agreement(s) that required the new tariff filing has been terminated by the time the revised tariff is required to be filed, we will not require the filing of a revised tariff, as the proposal would have. A refiling in that instance would be unnecessary because the original rates will now more likely reflect the cost/demand relationship of the carrier. If a LEC, however, subsequently reactivates the same telephone numbers in connection with a new access revenue sharing agreement, we will presumptively treat that action to be furtive concealment resulting in the loss of deemed lawful status for the LEC's tariff, as discussed below in conjunction with the discussion of section 204(a)(3) of the Act.¹¹⁵⁰ This will prevent a LEC from entering into a series of access revenue sharing agreements to avoid the 45-day filing requirement, while benefiting from the advertising of those telephone numbers used under previous agreements.

¹¹⁴⁴ *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4767, para. 663.

¹¹⁴⁵ *Id.*

¹¹⁴⁶ *Id.* at 4766, para. 661.

¹¹⁴⁷ *Id.* The prudent expenditure standard is associated with the "used and useful" doctrine, which together are employed in evaluating whether a carrier's rates are just and reasonable. See *Access Stimulation NPRM*, 22 FCC Rcd at 17997, para. 19, n.47.

¹¹⁴⁸ See, e.g., AT&T Section XV Comments at 17-18; USTelecom Section XV Comments at 11. Sprint is concerned that rates filed under section 61.38 will not be just and reasonable, even if LECs' projections are made in good faith because of the lack of a true-up mechanism. Sprint Section XV Comments at 15. Sprint's concern is unfounded. The revised tariffs filed by a section 61.38 carrier meeting the revenue sharing definition will be subject to the Commission's tariff review processes in which the projected cost and demand data can be reviewed and appropriate action taken if necessary.

¹¹⁴⁹ See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4767, para. 663.

¹¹⁵⁰ See *infra* para. 695. As described therein, a carrier may be required to make refunds if its tariff does not have deemed lawful status.

686. We also adopt the proposal that payments made by a LEC pursuant to an access revenue sharing agreement are not properly included as costs in the rate-of-return LEC's interstate switched access revenue requirement. This proposal received broad support in the record.¹¹⁵¹

687. We decline to adopt either of two suggested alternative pricing proposals for section 61.38 LECs. First, several parties suggested allowing a rate-of-return carrier filing a tariff based on projected costs and demand pursuant to section 61.38 to file a rate of \$0.0007, rather than requiring it to make a new cost showing.¹¹⁵² Second, other parties proposed that a section 61.38 carrier be allowed to benchmark to the BOC rate in the state since that rate is just and reasonable.¹¹⁵³ An established ratemaking procedure for section 61.38 LECs already exists. No party has demonstrated why either of the proposed rates would be preferable to the rates developed under existing ratemaking procedures. Thus, the rule we adopt will require section 61.38 carriers to set their rates based on projected costs and demand data.¹¹⁵⁴

688. *Competitive LECs.* In the *USF/ICC Transformation NPRM*, we proposed that when a competitive LEC is engaged in access stimulation, it would be required to benchmark its interstate switched access rates to the rate of the BOC in the state in which the competitive LEC operates, or the independent incumbent LEC with the largest number of access lines in the state if there is no BOC in the state, and if the competitive LEC is not already benchmarking to that carrier's rate.¹¹⁵⁵ Under the proposal, a competitive LEC would have to file a revised tariff within 45 days of engaging in access stimulation, or within 45 days of the effective date of the rule if it currently engages in access stimulation.¹¹⁵⁶

689. After reviewing the record, we adopt our proposal with one modification to ensure that the LEC refiles at a rate no higher than the lowest rate of a price cap LEC in the state. In so doing, we conclude that neither the switched access rate of the rate-of-return LEC in whose territory the competitive LEC is operating nor the rate used in the rural exemption¹¹⁵⁷ is an appropriate benchmark when the competitive LEC meets the access stimulation definition. In those instances, the access stimulator's traffic vastly exceeds the volume of traffic of the incumbent LEC to whom the access stimulator is currently benchmarking.¹¹⁵⁸ Thus, the competitive LEC's traffic volumes no longer operationally

¹¹⁵¹ See, e.g., AT&T Section XV Comments at 12-15; CenturyLink Section XV Comments at 53; Level 3 Section XV Comments at 3; XO Section XV Comments at 44; RNK Section XV Comments at 11.

¹¹⁵² See, e.g., AT&T Section XV Comments at 15-17; CTIA Section XV Comments at 7; MetroPCS Section XV Comments at 5; Sprint Section XV Comments at 8-9, 18-20; T-Mobile Section XV Comments at 8-9.

¹¹⁵³ CenturyLink Section XV Comments at 42; North County Section XV Comments at 2-3 (LECs reduce rates as volumes increase until the BOC rate is reached).

¹¹⁵⁴ Beginning July 1, 2012, rate-of-return LECs must comply with the transition procedures described in Section XII.C, *infra*.

¹¹⁵⁵ *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4767, para. 665.

¹¹⁵⁶ *Id.*

¹¹⁵⁷ See 47 C.F.R. § 61.26(e).

¹¹⁵⁸ For example, AT&T submitted data showing that the terminating MOU of 12 competitive LECs in Iowa, Minnesota, and South Dakota averaged 750,000,000 compared to 2,028,398 for NECA Band 8 LECs in those states. See Letter from Brian J. Benison, Director, Federal Regulatory, AT&T Services Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135, Attach. at 6 (filed Dec. 3, 2009) (AT&T Dec. 3, 2009 *Ex Parte* Letter). The relationship of those traffic volumes has not changed significantly since 2009. See Letter from Brian J. Benison, Director, Federal Regulatory, AT&T Services Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135, Attach. at 4 (filed May 13, 2011).

resemble the carrier's traffic volumes whose rates it had been benchmarking because of the significant increase in interstate switched access traffic associated with access stimulation.¹¹⁵⁹ Instead, the access stimulating LEC's traffic volumes are more like those of the price cap LEC in the state,¹¹⁶⁰ and it is therefore appropriate and reasonable for the access stimulating LEC to benchmark to the price cap LEC.¹¹⁶¹

690. Although many parties support using the switched access rates of the BOC in the state, or the rates of the largest independent LEC in the state if there is no BOC,¹¹⁶² as we proposed, we conclude that the lowest interstate switched access rate of a price cap LEC in the state is the rate to which a competitive LEC must benchmark if it meets the definition.¹¹⁶³ Generally, the BOC will have the lowest interstate switched access rates. However, the record reveals that in California, Pacific Bell's interstate switched access rates are higher than those of other price cap LECs in the state, as well as being higher than the interstate switched access rates of price cap LECs in other states. Benchmarking to the lowest price cap LEC interstate switched access rate in the state will reduce rate variance among states and will significantly reduce the rates charged by competitive LECs engaging in access stimulation, even if it does not entirely eliminate the potential for access stimulation.¹¹⁶⁴ However, should the traffic volumes of a competitive LEC that meets the access stimulation definition substantially exceed the traffic volumes of the price cap LEC to which it benchmarks, we may reevaluate the appropriateness of the competitive LEC's rates and may evaluate whether any further reductions in rates is warranted. In addition, we believe the reforms we adopt elsewhere in this Order will, over time, further reduce intercarrier payments and the incentives for this type of arbitrage.

691. We require a competitive LEC to file a revised interstate switched access tariff within 45 days of meeting the definition, or within 45 days of the effective date of the rule if on that date it meets the definition. A competitive LEC whose rates are already at or below the rate to which they would have to benchmark in the refiled tariff will not be required to make a tariff filing.

¹¹⁵⁹ See, e.g., AT&T Section XV Comments at 14-17; CenturyLink Section XV Comments at 37-40; T-Mobile Section XV Comments at 7-8.

¹¹⁶⁰ See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4767, para. 665. AT&T shows that "rural" access stimulating competitive LECs in Iowa, Minnesota and South Dakota collectively are terminating three to five times as many minutes as the largest incumbent LEC operating in the same state. AT&T Dec. 3, 2009 *Ex Parte* Letter, Attach. at 4.

¹¹⁶¹ We reject NASUCA's suggestion that we use the lowest NECA rate as the benchmark. NASUCA and NJ Rate Counsel Section XV Comments at 11. The traffic patterns of those NECA carriers are likely to be even less comparable to the traffic patterns of a competitive LEC engaged in access stimulation.

¹¹⁶² See, e.g., CenturyLink Section XV Comments at 38-39; ITTA Section XV Comments at 24-25; Level 3 Section XV Comments at 3; Omnitel and Tekstar Section XV Reply at 4, 17; IUB Section XV Comments at 17-18; Ohio Commission Section XV Comments at 14-15. Several parties argue that a lower rate would be reasonable and should be adopted. See, e.g., AT&T Section XV Comments at 17; CTIA Section XV Comments at 6-7; Sprint Section XV Comments at 2.

¹¹⁶³ We decline to adopt the Level 3 proposal that we adopt a requirement that a competitive LEC must file a declaration with the Commission attesting to the fact that it entered into an access revenue sharing agreement within 45 days of the effective date of the agreement. See Level 3 Section XV Comments at 4. Under the revised rules, competitive LECs are required to file revised tariffs if they engage in access stimulation. The proposed declaration would be duplicative.

¹¹⁶⁴ See, e.g., AT&T Section XV Comments at 17; Sprint Section XV Comments at 13.

692. We will not adopt a benchmarking rate of \$0.0007 in instances when the definition is met, as is suggested by a few parties.¹¹⁶⁵ The \$0.0007 rate originated as a negotiated rate in reciprocal compensation arrangements for ISP-bound traffic, and there is insufficient evidence to justify abandoning competitive LEC benchmarking entirely. Nor will we immediately apply bill-and-keep, as some parties have urged.¹¹⁶⁶ We adopt a bill-and-keep methodology for intercarrier compensation below, but decline to mandate a flash cut to bill-and-keep here. Additionally, we reject the suggestion that we detariff competitive LEC access charges if they meet the access stimulation definition.¹¹⁶⁷ Our benchmarking approach addresses access stimulation within the parameters of the existing access charge regulatory structure. We expect that the approach we adopt will reduce the effects of access stimulation significantly, and the intercarrier compensation reforms we adopt should resolve remaining concerns.

693. A few parties encourage the Commission to require high volume access tariffs (HVATs) for competitive LECs.¹¹⁶⁸ These tariffs reduce rates as volumes increase and, as suggested by some parties, would provide a transition from today's interstate switched access rates to the benchmarked rate over two years.¹¹⁶⁹ Under our benchmarking approach, if a competitive LEC meets the definition, its rates must be revised so that such rates are at or below the benchmark rate, unless they are already at those levels. A transitional HVAT that had one or more rates that exceeded the benchmark rate would not be in compliance with the benchmarking requirement adopted herein. Proponents of a transitional HVAT have not established why a transition is required or even appropriate, particularly considering the high traffic volumes associated with access stimulation. A competitive LEC that met the definition could, of course, file an HVAT if all of the rates in the tariff are below the benchmark rate.

694. We also decline to require or allow competitive LECs to use the "settlements specified in the extended average schedules published by NECA"¹¹⁷⁰ or the NECA rate band 1 local switching rate,¹¹⁷¹ or to permit a competitive LEC to use section 61.38 procedures to establish its interstate switched access rates if the price cap LEC rates would not adequately compensate the competitive LEC.¹¹⁷² We maintain the benchmarking approach to the regulation of the rates of competitive LECs. The average schedules published by NECA are inadequate for this purpose. The schedules are constrained by the characteristics of the carriers included in their samples, which likely do not include any rate-of-return LECs engaging in access stimulation. Thus, NASUCA has not shown that the average schedules would be a reasonable approach for establishing a rate to which competitive LECs could benchmark. There is insufficient evidence in the record that abandoning the benchmarking approach for competitive LEC tariffs and compelling competitive LECs to comply with 61.38 rules is necessary to address concerns regarding

¹¹⁶⁵ See, e.g., AT&T Section XV Comments at 21; Sprint Section XV Comments at 2, 8-9.

¹¹⁶⁶ See, e.g., CTIA Section XV Comments at 7; Leap Wireless and Cricket Section XV Comments at 7; MetroPCS Section XV Comments at 4; T-Mobile Section XV Comments at 2, 8-9.

¹¹⁶⁷ See, e.g., AT&T Section XV Comments at 13-17 (the BOC rate would continue to encourage traffic pumping); Sprint Section XV Comments at 20-21.

¹¹⁶⁸ See, e.g., Free Conferencing Corporation Section XV Comments at 37-38; see also Free Conferencing Corporation July 8, 2011 *Ex Parte* Letter, Attach. at 6 (urging the use of HVAT as a transition to BOC rates in two years).

¹¹⁶⁹ See Free Conferencing Corporation July 8, 2011 *Ex Parte* Letter, Attach. at 6-8.

¹¹⁷⁰ NASUCA Section XV Comments at 11.

¹¹⁷¹ Bluegrass Section XV Comments at 15-16.

¹¹⁷² Bluegrass Section XV Comments at 14-15; but see Free Conferencing Corporation Section XV Comments at 35 (opposing requiring a competitive LEC to use section 61.38).

access stimulation, particularly considering the burden that would be imposed on competitive LECs to start maintaining regulatory accounting records. Instead, we believe it is more appropriate to retain the benchmarking rule but revise it to ensure that the competitive LEC benchmarks to the price cap LEC with the lowest rate in the state, a rate which is likely most consistent with the volume of traffic of an access stimulating LEC.

695. *Section 204(a)(3) ("Deemed Lawful") Considerations.* In the *USF/ICC Transformation NPRM*, we proposed that LECs that meet the revenue sharing definition be required to file revised tariffs on not less than 16 days' notice.¹¹⁷³ We further proposed that if a LEC failed to comply with the tariffing requirements, we would find such a practice to be an effort to conceal its noncompliance with the substantive rules that would disqualify the tariff from deemed lawful treatment.¹¹⁷⁴ Finally, we proposed that rate-of-return LECs would be subject to refund liability for earnings over the maximum allowable rate-of-return,¹¹⁷⁵ and competitive LECs would be subject to refund liability for the difference between the rates charged and the rate that would have been charged if the carrier had used the prevailing BOC rate, or the rate of the independent LEC with the largest number of access lines in the state if there is no BOC.¹¹⁷⁶

696. After reviewing the record,¹¹⁷⁷ we decline to adopt our proposal. We conclude that the policy objectives of this proceeding can be achieved without creating an exception to the statutory tariffing timelines. LECs that meet the access stimulation trigger are required to refile their interstate switched access tariffs as outlined above. Any issues that arise in these refiled tariffs can be addressed through the suspension and rejection authority of the Commission contained in section 204 of the Act, or through appropriate enforcement action.

697. We conclude that a LEC's failure to comply with the requirement that it file a revised tariff if the trigger is met constitutes a violation of the Commission's rules, which is sanctionable under section 503 of the Act.¹¹⁷⁸ We also conclude that such a failure would constitute "furtive concealment" as described by the D.C. Circuit in *ACS v. FCC*.¹¹⁷⁹ We therefore put parties on notice that if we find in a complaint proceeding under sections 206-209 of the Act, that such "furtive concealment" has occurred, that finding will be applicable to the tariff as of the date on which the revised tariff was required to be

¹¹⁷³ *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4768, para. 666.

¹¹⁷⁴ The carrier would also be subject to sanctions for violating the Commission's tariffing rules.

¹¹⁷⁵ 47 C.F.R. § 65.700. An exchange carrier's interstate earnings are measured in accordance with the requirements set forth in 47 C.F.R. § 65.702.

¹¹⁷⁶ *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4768, para. 666.

¹¹⁷⁷ See, e.g., Level 3 Section XV Comments at 4.

¹¹⁷⁸ Section 503(b)(2)(B) of the Act authorizes the Commission to assess a forfeiture of up to \$150,000 for each violation, or each day of a continuing violation, up to a statutory maximum of \$1,500,000 for a single act or failure to act by common carriers; see also 47 C.F.R. § 1.80(b)(2). In 2008, the Commission amended its rules to increase the maximum forfeiture amounts in accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461. See *Amendment of Section 1.80(b) of the Commission's Rules, Adjustment of Forfeiture Maximum to Reflect Inflation*, EB File No. EB-06-SE-132, Order, 23 FCC Rcd 9845 at 9847 (2008).

¹¹⁷⁹ In 2002, the United States Court of Appeals for the D.C. Circuit, in reversing a Commission decision that had found a tariff filing did not qualify for deemed lawful treatment and was thus subject to possible refund liability, noted that it was not addressing "the case of a carrier that furtively employs improper accounting techniques in a tariff filing, thereby concealing potential rate of return violations." *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 413 (D.C. Cir. 2002) (*ACS v. FCC*).

filed and any refund liability will be applied as of such date. We conclude that this approach will eliminate any incentives that LECs may have to delay or avoid complying with the requirement that they file revised tariffs. Several parties support this approach.¹¹⁸⁰

698. All American Telephone Co. filed a petition for declaratory ruling requesting that the Commission find that commercial agreements involving the sharing of access revenues between LECs and “free” service providers do not violate the Communications Act.¹¹⁸¹ In this Order, we adopt a definition of access revenue sharing agreement and prescribe that a LEC meeting the conditions of that definition must file revised tariffs. Given our findings and the rules adopted today, we decline to address the All American petition and it is dismissed.

(iii) Enforcement

699. The revised interstate access rules adopted in this Order will facilitate enforcement through the Commission’s complaint procedures, if necessary.¹¹⁸² A complaining carrier may rely on the 3:1 terminating-to-originating traffic ratio and/or the traffic growth factor for the traffic it exchanges with the LEC as the basis for filing a complaint. This will create a rebuttable presumption that revenue sharing is occurring and the LEC has violated the Commission’s rules. The LEC then would have the burden of showing that it does not meet both conditions of the definition. We decline to require a particular showing, but, at a minimum, an officer of the LEC must certify that it has not been, or is no longer engaged in access revenue sharing, and the LEC must also provide a certification from an officer of the company with whom the LEC is alleged to have a revenue sharing agreement(s) associated with access stimulation that that entity has not, or is not currently, engaged in access stimulation and related revenue sharing with the LEC.¹¹⁸³ If the LEC challenges that it has met either of the traffic measurements, it must provide the necessary traffic data to establish its contention. With the guidance in this Order, we believe parties should in good faith be able to determine whether the definition is met without further Commission intervention.

700. *Non-payment Disputes.* Several parties have requested that the Commission address alleged self-help by long distance carriers who they claim are not paying invoices sent for interstate

¹¹⁸⁰ See, e.g., PAETEC et al. Section XV Comments at 31; XO Section XV Comments at 46 (adopt a rebuttable presumption that increases in access volumes of more than 100 percent in a six month time period would automatically revoke, for the period contemporaneous with and following the increase, the “deemed lawful” status of a LEC whose interstate tariffed rates are above those of the BOC or largest incumbent LEC in the state until reviewed by the Commission).

¹¹⁸¹ See Petition for Declaratory Ruling of All American Telephone Co., Inc., e.Pinnacle Communications, Inc., and ChaseCom to Reconfirm that Local Exchange Carrier Commercial Agreements with Providers of Conferencing, “Chat Line” and Other Services Do Not Violate the Communications Act, WC Docket No. 07-135 (filed May 20, 2009).

¹¹⁸² Given the two-year statute of limitations in section 405 of the Act, 47 U.S.C. § 405, a complaining IXC would have two years from the date the cause of action accrued (the date after the tariff should have been filed) to file its complaint. Because the rules we adopt are prospective, they will have no binding effect on pending complaints.

¹¹⁸³ The Ohio Commission argues that the Commission should not prohibit rebates, credits, discounts, etc. Ohio Commission Section XV Comments at 13-14. Section 203(c)(1) provides that no carrier shall “charge, demand, collect, or receive a greater or less or different compensation for such communication...than the charges specified in the schedule then in effect.” 47 U.S.C. § 203(c)(1). A corollary to subparagraph (1), section 203(c)(2) provides that no carrier shall “refund or remit by any means or device any portion of the charges so specified.” 47 U.S.C. § 203(c)(2). This prohibition on rebates is intended to preclude discrimination in charges, and the practice may be subject to sanctions under section 503. 47 U.S.C. § 503.

switched access services.¹¹⁸⁴ As the Commission has previously stated, “[w]e do not endorse such withholding of payment outside the context of any applicable tariffed dispute resolution provisions.”¹¹⁸⁵ We otherwise decline to address this issue in this Order, but caution parties of their payment obligations under tariffs and contracts to which they are a party. The new rules we adopt in today’s Order will provide clarity to all affected parties, which should reduce disputes and litigation surrounding access stimulation and revenue sharing agreements.

(iv) Conclusion

701. The rules we adopt in this section will require rates associated with access stimulation to be just and reasonable because those rates will more closely reflect the access stimulators’ actual traffic volume. Taking this basic step will immediately reduce some of the inefficient incentives enabled by the current intercarrier compensation system, and permit the industry to devote resources to innovation and investment rather than access stimulation and disputes. We have balanced the need for our new rules to address traffic stimulation with the costs that may be imposed on LECs and have concluded that the benefits justify any burdens. Our new rules will work in tandem with the comprehensive intercarrier compensation reforms we adopt below, which will, when fully implemented, eliminate the incentives in the present system that give rise to access stimulation.

B. Phantom Traffic

702. In this portion of the Order, we amend the Commission’s rules to address “phantom traffic” by ensuring that terminating service providers receive sufficient information to bill for telecommunications traffic sent to their networks, including interconnected VoIP traffic. The amendments we adopt close loopholes that are being used to manipulate the intercarrier compensation system.

703. “Phantom traffic” refers to traffic that terminating networks receive that lacks certain identifying information. In some cases, service providers in the call path intentionally remove or alter identifying information to avoid paying the terminating rates that would apply if the call were accurately signaled and billed. For example, some parties have sought to avoid payment of relatively high intrastate access charges by making intrastate traffic appear interstate or international in nature.¹¹⁸⁶ Parties have also disguised or routed non-local traffic subject to access charges to avoid those charges in favor of lower reciprocal compensation rates.¹¹⁸⁷ Collectively, problems involving unidentifiable or misidentified traffic appear to be widespread. Parties have documented that phantom traffic is a sizeable problem, with estimates ranging from 3-20 percent of all traffic on carriers’ networks,¹¹⁸⁸ which costs carriers—and

¹¹⁸⁴ See, e.g., Pac-West Section XV Comments at 17-19 (carriers must dispute and pay for there to be a level playing field for all carriers).

¹¹⁸⁵ *All American Telephone Co., et al. v. AT&T Corp.*, File EB-10-MD-003, Memorandum Opinion and Order, 26 FCC Rcd 723, 728 (2011).

¹¹⁸⁶ See, e.g., CenturyLink Section XV Comments at 19.

¹¹⁸⁷ See *id.*; see also Windstream Section XV Comments at 15-16.

¹¹⁸⁸ See TCA Section XV Comments at 5 (“TCA concurs in various estimates indicating that phantom traffic comprises up to 20 percent of all terminating traffic for many rural LECs.”); Kansas Commission Section XV Comments at 17; Letter from Michael D. Saperstein, Jr., Director of Federal Regulatory Affairs, Frontier Communications, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51, WC Docket Nos. 07-135, 05-337, 04-36, CC Docket Nos. 99-68, 01-92 at 1 (filed Dec. 21, 2010); see also April 6, 2011 ICC Hearing Transcript at 44-45.

ultimately consumers—potentially hundreds of millions of dollars annually.¹¹⁸⁹ In turn, carriers are diverting resources to investigate and pursue billing disputes, rather than use such resources for more productive purposes such as capital investment.¹¹⁹⁰ This sort of gamesmanship distorts the intercarrier compensation system and chokes off revenue that carriers depend on to deliver broadband and other essential services to consumers, particularly in rural and difficult to serve areas of the country.

704. To address the problem, in the *USF/ICC Transformation NPRM*, we proposed to modify our call signaling rules to require originating service providers to provide signaling information that includes calling party number (“CPN”) for all voice traffic, regardless of jurisdiction, and to prohibit interconnecting carriers from stripping or altering that call signaling information. Based on the record developed in this proceeding, we now adopt our original proposal with the minor modifications described in further detail below. Service providers that originate interstate or intrastate traffic on the PSTN, or that originate inter- or intrastate interconnected VoIP traffic destined for the PSTN, will now be required to transmit the telephone number associated with the calling party to the next provider in the call path. Intermediate providers must pass calling party number or charge number signaling information they receive from other providers unaltered, to subsequent providers in the call path.¹¹⁹¹ These requirements will assist service providers in appropriately billing for calls traversing their networks.

705. By ensuring that the calling party telephone number information is provided and transmitted for all types of traffic originating or terminating on the PSTN, our revised rules will assist service providers in accurately identifying and billing for traffic terminating on their networks, and help to guard against further arbitrage practices. These measures will work in tandem with the Commission’s reforms adopted elsewhere in this Order, which, by minimizing intercarrier compensation rate differences, promise to eliminate the incentive for providers to engage in phantom traffic arbitrage.¹¹⁹² Together, these changes will benefit consumers by enabling providers to devote more resources to investment and innovation that would otherwise have been spent resolving billing disputes.

706. Below, we briefly review how service providers exchange necessary billing information and why the current regime of information exchange has proved inadequate to avoid the problems of phantom traffic. We explain how the rules we adopt present an effective, technologically neutral, and forward-looking solution to reduce litigation and disputes over unidentifiable traffic. Finally, we review several proposals received in the record related to our proposed rules.

1. Background

707. Service providers need to know certain information for each call to bill for and receive intercarrier payments for traffic that terminates on their networks. Specifically, to know what intercarrier compensation charges apply, a terminating provider must be able to identify the appropriate upstream service provider and the geographic location of the caller (or a proxy for the caller’s location). For calls directly connected between an originating service provider and a terminating service provider, this

¹¹⁸⁹ ITTA Section XV Comments at 4 (citing C. Goldfarb, “Phantom Traffic” – Problems Billing for the Termination of Telephone Calls: Issues for Congress 1 (Cong Res. Serv., June 27, 2008)).

¹¹⁹⁰ See, e.g., CenturyLink Section XV Comments at 19; Louisiana Small Company Committee Section XV Comments at 11 (“Phantom traffic impacts carriers’ ability to invest in networks and services, and undermines their ability to ensure adequate facilities are in place to meet consumers’ evolving and expanding needs.”).

¹¹⁹¹ See *infra* at App. [] .

¹¹⁹² See Cincinnati Bell August 3 PN Comments at 10-11; Charter August 3 PN Reply at 6; VON Coalition August 3 PN Comments at 7.

information typically is apparent or easily obtained.¹¹⁹³ However, for calls where the originating and terminating network are not directly connected (i.e., when calls are delivered via tandem transit service or interexchange carrier),¹¹⁹⁴ accurate call information may not be available because there may be one or more interconnecting service providers that handle the call before delivering it to the terminating service provider. The terminating carrier may not receive accurate identifying information for a variety of reasons. For instance, signaling for the call may never have been populated with accurate information or the information may have been intentionally stripped.¹¹⁹⁵

708. As described in the *USF/ICC Transformation NPRM*, terminating service providers that are not directly connected to originating providers receive information about calls sent to their networks for termination from a variety of sources. First, terminating service providers may rely on information contained in the Signaling System 7 (SS7) signaling stream. SS7 is a separate or “out of band” network that runs parallel to the PSTN. Commission rules require carriers that use SS7 to convey the calling party number (CPN) to subsequent carriers on interstate calls where it is technically feasible to do so.¹¹⁹⁶ Billing records from tandem switch operators are another source of information for terminating service providers about traffic on their networks.¹¹⁹⁷ Notably, the CPN or Charge Number (CN) information used in billing records is derived from the SS7 signaling stream.¹¹⁹⁸ Finally, service providers may also rely on identifying information contained in Internet protocol sessions or messages (e.g., Session Initiation Protocol (SIP) header fields) for VoIP calls.¹¹⁹⁹

¹¹⁹³ See PAETEC et al. Section XV Comments at 3.

¹¹⁹⁴ *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4752-53, para. 622. Competitive LECs, CMRS carriers, and rural LECs, who would otherwise have no efficient means of connecting their networks, often rely upon transit service from incumbent LECs to facilitate indirect interconnection with each other. See *Developing a Unified Inter-carrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685 at 4740, para. 125 (2005).

¹¹⁹⁵ See *infra* para. 709.

¹¹⁹⁶ See 47 C.F.R. § 64.1601. As we described in the *USF/ICC Transformation NPRM*, the SS7 call signaling system is used to set up a pathway across the PSTN and the system performs the function of identifying a path a call can take after the caller dials the called party's number. See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4751-52, para. 621. Although 47 C.F.R. § 64.1601 requires that the CPN be transmitted where technically feasible, the technical content and format of SS7 signaling is governed by industry standards rather than by Commission rules.

¹¹⁹⁷ Billing records are typically created by a tandem switch that receives a call for delivery to a terminating network via tandem transit service. See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4752-53, para. 622 and n.950. Service providers delivering billing records typically use the Exchange Message Interface (EMI) format created and maintained by the Alliance for Telecommunications Industry Solutions Ordering and Billing Forum (ATIS/OBF), an industry standards setting group. See ATIS Exchange Message Interface 22 Revision 2, ATIS Document number 0406000-02200 (July 2005).

¹¹⁹⁸ SS7 was designed to facilitate call routing and was not designed for billing purposes. See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4751-52, para. 621 (citing Letter from L. Charles Keller, Counsel for Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 2 (filed Sept. 13, 2005) (Verizon Wireless Sept. 13, 2005 *Ex Parte* Letter)).

¹¹⁹⁹ See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4751-53, paras. 621-22; RFC 3261, SIP: Session Initiation Protocol (2002) at www.ietf.org/rfc/rfc3261.txt; Megaco Protocol Version 1.0 (2000) at <http://datatracker.ietf.org/doc/rfc3015/>.

709. The record in this proceeding confirms that numerous service providers have encountered difficulties with traffic arriving for termination with insufficient or inaccurate identifying information.¹²⁰⁰ The record suggests that gamesmanship with regard to calling party information is rife.¹²⁰¹ Commenters describe a number of phantom traffic tactics used to avoid higher intercarrier charges including masking intrastate traffic to make it appear interstate or international in nature.¹²⁰² One carrier alleges that a common phantom traffic scheme it faces involves carriers that disguise traffic by putting a telephone number into the CN field that is local to the terminating exchange to avoid higher intercarrier compensation rates.¹²⁰³

2. Revised Call Signaling Rules

710. *Intrastate Traffic.* As described below, we expand the scope of our existing call signaling rules to encompass jurisdictionally intrastate traffic. The record reflects broad support for expanding our rules in this manner and no party opposed or questioned the Commission's legal authority to do so.¹²⁰⁴ The Commission has previously recognized, in exercising authority over intrastate call signaling for caller ID purposes, that "CPN-based services are 'jurisdictionally mixed services'" and that it would be "impractical and uneconomic" to require the development and implementation of systems that would permit separate federal and state call signaling rules to operate.¹²⁰⁵ We conclude that, as with call signaling in the caller ID context, it would be impractical to have separate federal and state rules regarding inclusion of CPN in signaling.¹²⁰⁶ And, we agree with comments in the record asserting that extension of the call signaling rules to intrastate traffic is "justified... because maintaining separate mechanisms for passing CPN is infeasible, and passing CPN is necessary to identify and thus facilitate federal regulation of interstate traffic."¹²⁰⁷

¹²⁰⁰ See, e.g., USTelecom Section XV Comments at 4 ("Many carriers report that the amount of traffic being received by terminating carriers without calling party identifying information has continued to grow.").

¹²⁰¹ For example, according to Frontier, an investigation found an "incredible amount of traffic from one telephone number" terminating to its network - an average of 43,378 minutes of interstate traffic a day. Frontier Section XV Comments at 11. According to Frontier, this number was being used to make the traffic appear to be interstate so as to mask the true intrastate nature of the calls to avoid paying intrastate access charges. *Id.*; see also USTelecom Section XV Comments at 4.

¹²⁰² CenturyLink Section XV Comments at 19.

¹²⁰³ Windstream Section XV Comments at 16.

¹²⁰⁴ Numerous parties supported the proposal to expand the scope of the rule to encompass intrastate traffic. See, e.g., California Commission Section XV Comments at 6 ("And we agree that these new rules be extended, as the FCC proposes, 'to all traffic originating or terminating on the PSTN, including but not limited to, jurisdictionally intrastate traffic ...'"); Rural Associations Section XV Comments at 17, 25; TCA Section XV Comments at 6.

¹²⁰⁵ *Rules and Policies Regarding Calling Number Identification Service – Caller ID*, CC Docket No. 91-281, Memorandum Opinion and Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking, 10 FCC Rcd 11700, 11723, para. 62 (1995) (*Caller ID Order*).

¹²⁰⁶ In the caller ID context, the Commission found that it would be impractical to require the development and implementation of systems that would permit separate federal and state call signaling rules to operate because such systems would be burdensome, confusing to consumers, and would potentially slow down the call signaling process. See *id.* at 11724-27, paras. 65-74. In the present context of including CPN in signaling, we conclude that separate CPN inclusion requirements for interstate and intrastate traffic are impractical because a call's jurisdiction is typically not determined until after the call signaling process occurs.

¹²⁰⁷ AT&T Section XV Comments at 22 ("Extension of the current rules to intrastate calls is justified under these standards because maintaining separate mechanisms for passing CPN is infeasible, and passing CPN is necessary to (continued...)")

711. *Calling Party Number*. In the *USF/ICC Transformation NPRM*, we sought comment on extending our call signaling rules (which currently require certain common carriers using SS7 to transmit the CPN associated with an interstate call to interstate carriers¹²⁰⁸) to all traffic originating or terminating on the PSTN, including but not limited to jurisdictionally intrastate traffic¹²⁰⁹ and traffic transmitted using Internet protocols.¹²¹⁰ The record broadly supports this change to our rules either as proposed, or as a baseline for addressing phantom traffic problems.¹²¹¹ We expect that these rule modifications will help reduce regulatory gamesmanship.¹²¹²

712. *SS7 Charge Number (CN)*. The *USF/ICC Transformation NPRM* also proposed to apply call signaling rules to address CN where carriers use SS7 signaling.¹²¹³ Generally, the CN field is not populated in the SS7 stream when it is the same as CPN.¹²¹⁴ However, in cases where the CN is different from the CPN (e.g., where a business has a single charge number for multiple end user numbers), the CN parameter is populated and included in billing records in place of CPN.¹²¹⁵ Consistent with industry practice, the *USF/ICC Transformation NPRM* proposed to clarify that populating the SS7 CN field with information other than the charge number to be billed for a call is prohibited.

713. Windstream maintains that “[i]t is critical that the Commission make clear that scheming carriers cannot disguise jurisdiction on billing records by failing to provide or manipulating the CN,” a practice it states is common.¹²¹⁶ On the other hand, some parties object to any requirement to not alter the CN field.¹²¹⁷ According to these parties, the proposed requirement is problematic because intermediate providers may not be able to pass the CN field in some instances,¹²¹⁸ and the requirement would prevent (Continued from previous page)

identify and thus facilitate federal regulation of interstate traffic.”). Unlike the caller ID context, in which a California law permitting CPN blocking in certain circumstances was expressly preempted, (*See Caller ID Order*, 10 FCC Rcd at 11730, para. 85) we are not aware of any state laws that conflict with the call signaling rules we adopt. Accordingly, we do not preempt any state laws at this time. If, however, a state law conflicting with our revised call signaling rules were enacted, preemption analysis would be appropriate.

¹²⁰⁸ See 47 C.F.R. § 64.1601.

¹²⁰⁹ See *supra* note 1204.

¹²¹⁰ See *infra* para. 717.

¹²¹¹ See, e.g., Missouri Commission Section XV Comments at 7; NASUCA and NJ Rate Counsel Section XV Reply at 8-9; XO Section XV Comments at 37.

¹²¹² As we stated in the *USF/ICC Transformation NPRM*, our proposed rules are not intended to affect existing agreements between service providers regarding how to jurisdictionalize traffic in the event that traditional call identifying parameters are missing, as long as such agreements are otherwise consistent with Commission rules and other legal requirements. See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4756, para. 632. Accordingly, we decline to adopt proposals to use calling party number or originating and terminating numbers as the basis for jurisdictionalizing calls. See, e.g., Rural Associations Section XV Comments at 27-29; Rural Associations Section XV Reply at 12; but see CTIA Section XV Comments at 9-10; NASUCA and NJ Rate Counsel Section XV Reply at 11.

¹²¹³ *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4756, para. 631.

¹²¹⁴ See *id.*

¹²¹⁵ See Windstream Section XV Comments at 13.

¹²¹⁶ *Id.* at 14.

¹²¹⁷ See, e.g., PAETEC et al. Section XV Comments at 8-9; PAETEC et al. Section XV Reply at 6-7.

¹²¹⁸ See Verizon Section XV Comments at 49 n. 69; HyperCube Section XV Reply at 12-13.

intermediate providers from modifying the CN for their own purposes.¹²¹⁹

714. We adopt the proposal contained in the *USF/ICC Transformation NPRM* to require that the CN be passed unaltered where it is different from the CPN. We believe that this requirement will be an adequate remedy to the problem of CN number substitution that disguises the characteristics of traffic to terminating service providers. Additionally, we note that the CN field may only be used to contain a calling party's charge number, and that it may not contain or be populated with a number associated with an intermediate switch, platform, or gateway, or other number that designates anything other than a calling party's charge number. We are not persuaded by objections to this requirement. First, unsupported objections that there may be "circumstances where a CN may be different from the CPN but cannot be easily transmitted" are unpersuasive without more specific evidence.¹²²⁰ Second, we note that the Commission addressed similar circumstances in the 2006 *Prepaid Calling Card Order*, and prohibited carriers that serve prepaid calling card providers from passing the telephone number associated with the platform in the charge number parameter.¹²²¹ In this case, we agree with the analysis of the *Prepaid Calling Card Order* that "[b]ecause industry standards allow for the use of CN to populate carrier billing records ... passing the number of the [] platform in the parameters of the SS7 stream to carriers involved in terminating a call may lead to incorrect treatment of the call for billing purposes."¹²²² In sum, the record demonstrates that CN substitution is a technique that leads to phantom traffic, and our proposed rules are a necessary and reasonable response.¹²²³

715. *Multi-Frequency (MF) Automatic Number Identification (ANI)*. As noted in the *USF/ICC Transformation NPRM*, some service providers do not use SS7 signaling, but instead rely on Multi-Frequency (MF) signaling.¹²²⁴ The *USF/ICC Transformation NPRM* proposed that service providers using MF Signaling pass the CPN, or the CN if different, in the MF Automatic Number Identification (MF ANI) field.¹²²⁵

716. We amend our rules to require service providers using MF signaling to pass the number of the calling party (or CN, if different) in the MF ANI field. This requirement will provide consistent treatment across signaling systems and will ensure that information identifying the calling party is included in call signaling information for all calls.¹²²⁶ Moreover, this requirement responds to the concerns expressed in the record that MF signaling can be used by "unscrupulous providers" to engage in phantom traffic practices.¹²²⁷ The previous record concerning the technical limitations of MF ANI

¹²¹⁹ PAETEC et al. Section XV Reply at 6-7.

¹²²⁰ Verizon Section XV Comments at 49 n.69.

¹²²¹ *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290, 7302-03, para. 34 (2006) (*Prepaid Calling Card Order*).

¹²²² See *id.*

¹²²³ See, e.g., Windstream Section XV Comments at 15-17.

¹²²⁴ Some providers also use IP signaling. See *infra* para. 717.

¹²²⁵ See Core Section XV Comments at 11 ("Identifying the calling party's number in the SS7 context, and the ANI and/or Caller ID in the MF signaling context, will certainly help carriers reduce and narrow call rating disputes."); but see AT&T Section XV Comments at 25.

¹²²⁶ As a result, we decline to adopt AT&T's suggestion that we broadly exempt MF signaling. See AT&T Section XV Comments at 25.

¹²²⁷ See XO Section XV Comments at 36-37.

appears to be mixed.¹²²⁸ In balancing the need for a rule that covers all traffic with the technical limitations asserted in the record, we conclude that the approach most consistent with our policy objective is not to exclude the entire category of MF traffic. Such a categorical exclusion could create a disincentive to invest in IP technologies and invite additional opportunities for arbitrage. Although our rules will apply to carriers that use or pass MF signaling, we do not mandate any specific method of compliance. Carriers will have flexibility to devise their own means to pass this information in their MF signaling. Nevertheless, to the extent that a party is unable to comply with our rule as a result of technical limitations related to MF signaling in its network, it can seek a waiver for good cause shown, pursuant to section 1.3 of the Commission's rules.¹²²⁹

717. *IP Signaling.* Consistent with the proposal in the *USF/ICC Transformation NPRM*, the rules we adopt today also apply to interconnected VoIP traffic. Failure to include interconnected VoIP traffic in our signaling rules would create a large and growing loophole as the number of interconnected VoIP lines in service continues to grow.¹²³⁰ Many commenters supported application of the proposed requirements to VoIP traffic.¹²³¹ Therefore, VoIP service providers will be required to transmit the telephone number of the calling party for all traffic destined for the PSTN that they originate. If they are intermediate providers in a call path, they must pass, unaltered, signaling information they receive indicating the telephone number, or billing number if different, of the calling party. Because IP transmission standards and practices are rapidly changing, we refrain from mandating a specific compliance method and instead leave to service providers using different IP technologies the flexibility to determine how best to comply with this requirement.

718. In extending our call signaling rules to interconnected VoIP service providers, we acknowledge that the Commission has not classified interconnected VoIP services as "telecommunications services" or "information services." We need not resolve this issue here, for we would have authority to impose call signaling on interconnected VoIP providers even under an information service classification.¹²³² This Order adopts intercarrier compensation requirements for the

¹²²⁸ Compare AT&T Section XV Comments at 25 ("Multi Frequency signaling was not designed in many instances to forward originating CN or CPN data to a terminating carrier in the MF Automatic Number Identification (ANI) field. Rather, the MF ANI standards and technology were developed to provide IXCs with the data they need to bill end user customers that originate calls."); Verizon 2008 ICC/USF NPRM Comments at 65 n.97 ("MF trunks are configured to signal ANI only on the originating end of a Feature Group D access call. . . . MF trunks do not signal ANI on non-access calls or on the terminating leg of an access call."); with Participating Wyoming Rural Independents Missoula Plan Comments at 17 (an exception for MF signaling relating to non-Feature Group D traffic is unnecessary, because "[c]urrent technology and methods do exist to enable carriers to identify MF signaling protocol. Thus, to allow for an unnecessary exception would exacerbate phantom traffic problems").

¹²²⁹ See *infra* para. 723; 47 C.F.R. § 1.3.

¹²³⁰ Total business and residential interconnected VoIP service connections have increased from 21.7 million in December 2008 to 31.7 million in December 2010. See Industry Analysis and Technology Division, Wireline Competition Bureau, *Local Telephone Competition Report: Status as of December 2010*, at 2 (Oct. 2011). See also e.g., Blooston Section XV Comments at 5; ITTA Section XV Comments at 3; CenturyLink Section XV Comments at 7.

¹²³¹ Frontier Section XV Comments at 12 ("Failure to apply these rules equally to VoIP traffic would leave a gaping hole in the Commission's rules for the fastest-growing segment of traffic"); see also Consolidated Section XV Comments at 34-36.

¹²³² See 47 U.S.C. §§ 151, 152, 154(i); *Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010) (quoting *Am. Library Ass'n v. FCC*, 406 F.3d 689, 691-692 (D.C. Cir. 2005)) ("The Commission ... may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission's general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject; and (2) the regulations are reasonably ancillary to the (continued...)")

exchange of VoIP-PSTN traffic between a LEC and another carrier.¹²³³ Applying our call signaling rules to interconnected VoIP service providers will enable service providers terminating interconnected VoIP traffic to receive signaling information that will help prevent this traffic from terminating without compensation,¹²³⁴ contrary to the prospective intercarrier compensation regime we adopt for that traffic under section 251(b)(5). In addition, under the intercarrier compensation reform framework we adopt today, traffic terminating without compensation could create a need for recovery that shifts costs created by phantom traffic to end-user rates or the Connect America Fund, undermining the transitional role for intercarrier compensation charges established as part of that framework. Our new call signaling rules are necessary to address these concerns.

3. Prohibition of Altering or Stripping Call Information

719. In the *USF/ICC Transformation NPRM*, we also sought comment on a proposed rule that would prohibit service providers from altering or stripping relevant call information. More specifically, we proposed to require all telecommunications providers and entities providing interconnected VoIP service to pass the calling party's telephone number (or, if different, the financially responsible party's number), unaltered, to subsequent carriers in the call path.¹²³⁵ Commenters overwhelmingly supported this proposal.¹²³⁶ We believe that a prohibition on stripping or altering information in the call signaling stream serves the public interest. The prohibition should help ensure that the signaling information required by our rules reaches terminating carriers. Therefore, we adopt our proposal to prohibit stripping or altering call signaling information with the modifications discussed below.

720. In response to comments in the record, we make several clarifying changes to the text of the proposed rules in this section. First, commenters objected to the use of the undefined term "financially responsible party" in the proposed rules.¹²³⁷ We agree with the concerns and clarify that providers are required to pass the billing number (e.g., CN in SS7) if different from the calling party's number. For similar reasons, for purposes of this rule, we add the following definition of the term "intermediate provider" to the rules: "any entity that carries or processes traffic that traverses or will traverse the PSTN at any point insofar as that entity neither originates nor terminates that traffic." We find that adding this definition will eliminate potential ambiguity in the revised rule.¹²³⁸ As provided in Appendix A, we also make modest adjustments to the rules proposed in the *USF/ICC Transformation*

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Commission's effective performance of its statutorily mandated responsibilities."). Additionally, as the Commission has previously found, section 706 provides authority applicable in this context. *See generally Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17968-72, paras. 117-23 (2010).

¹²³³ See *infra* Section XIV.

¹²³⁴ Carriers are generally prohibited from blocking calls. *See Establishing Just and Reasonable Rates for Local Exchange Carriers; Call Blocking by Carriers*, WC Docket No. 07-135, 22 FCC Rcd 11629 (2007) (*Call Blocking Declaratory Ruling*). Therefore, there may be situations where a carrier is forced to complete a call even though it is unable to bill for that call due to lack of identifying information in its signaling. *See* Core Section XV Reply at 2; *see also infra* para 973.

¹²³⁵ *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4793, App. B.

¹²³⁶ See, e.g., ATA Section XV Comments at 4; Comcast Section XV Comments at 9; Leap Wireless and Cricket Section XV Comments at 8.

¹²³⁷ See AT&T Section XV Comments 25; Verizon Section XV Comments at 51.

¹²³⁸ See, e.g., Verizon Section XV Comments at 50 (noting that the term "intermediate provider" was undefined).